

No. CR-04-0334

*In the COURT of CRIMINAL APPEALS
of ALABAMA*

KOURTNEY SOVERN GREENWOOD,

Appellant,

v.

STATE of ALABAMA,

Appellee.

*On Appeal From the Circuit Court of
Montgomery County
(CC-02-909.61)*

BRIEF OF APPELLEE

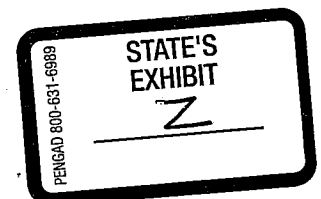
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January 25, 2005



STATEMENT REGARDING ORAL ARGUMENT

The State does not view oral argument as necessary in this case because the issues raised are not complicated and they have been thoroughly briefed.

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STATEMENT OF THE CASE AND FACTS

This appeal arises from the denial of Kourtney Sovern Greenwood's ("Greenwood") Rule 32 Petition for Post-Conviction Relief in the Circuit Court of Montgomery County, Alabama. Judge Truman M. Hobbs, Jr., presided.

On July 19, 2002, the Montgomery County Grand Jury indicted Greenwood for one count of robbery in the first degree committed with a firearm. (TC. 5-6)¹ At the trial on December 10-11, 2002, the State presented the testimony of Larry Copeland, Jr. (TR. 35-52)² Copeland testified that he was walking in the area of Virginia Loop Road and Raintree Drive on April 8, 2002, at approximately 11:00 p.m., with a thirteen-year-old boy named Serillo. (TR. 35-38) Copeland testified that they encountered two men running towards them at a fast pace. One of the men drew a weapon, a gun, telling Copeland to "give it up", while the other man physically restrained Serillo. (TR. 38-49) Copeland testified that, after the two robbers took his

¹ "TC" refers to the clerk's record from Greenwood's direct appeal record in Docket # CR-02-0634.

² "TR" refers to the trial record from Greenwood's direct appeal record in Docket # CR-02-0634.

wallet, they walked away and then fled the scene in a red S-10 truck. (TR. 47, 51-52)

Copeland called the police and gave a statement to Montgomery Police Detective N.T. Buce, where he described the second robber as a dark-skinned black male who wore "twists" in his hair. (TR. 50-52) Outside the presence of the jury, Detective Buce testified that Kourtney Greenwood and Jamar Brown became suspects because witnesses in a subsequent robbery identified them as the perpetrators and described the same red S-10 truck as their vehicle. (TR. 93-95) Detective Buce testified that Copeland later identified Kourtney Greenwood and Jamar Brown out of photographic line-ups; Copeland identified Greenwood as the robber who held Serillo and who wore "twists" in his hair. (TR. 80-84)

At trial, Greenwood presented testimony from family members and a former girlfriend that he never wore his hair in "twists." (TR. 100-137) Greenwood also presented the testimony of former girlfriend Lavon Howard, who testified that Greenwood was babysitting their children on the night of the robbery; however, Howard also testified that she had never told this to law enforcement. (R. 126-128)

Greenwood testified that he had never worn his hair in "twists," that he did not know Jamar Brown, and that he was babysitting the night of the robbery. (TR. 138-146) In rebuttal, the State presented the testimony of Harold Franklin. (TR. 147-153) Franklin testified that he had seen both Jamar Brown and Kourtney Greenwood together at Trenholm Court housing project on March 30, 2002, and that Greenwood was wearing "twists" in his hair at the time. (TR. 148-149)

On December 11, 2002, the jury returned a verdict finding Greenwood guilty of robbery in the first degree.

(TC. 2, 13; TR. 213) Due to Greenwood's two prior felony convictions, the trial court sentenced Greenwood to life in prison. (TC. 3, 14-33) The only issue Greenwood raised on appeal was his claim that the evidence was insufficient to support his conviction for robbery in the first degree. The Alabama Court of Criminal Appeals affirmed Greenwood's conviction and issued a certificate of judgment on August 15, 2003.

On September 15, 2003, Greenwood filed his first Rule 32 petition for post-conviction relief in the Montgomery

County Circuit Court. (C1. 1, 7-40)³ In this petition, Greenwood alleged the following: His sentence exceeded the maximum because he was indicted for robbery in the third degree rather than robbery in the first degree; the indictment was insufficient because it failed to allege that Greenwood caused "serious physical injury"; the trial court was without jurisdiction because he was illegally arrested; he was improperly sentenced under the Habitual Felony Offender Act; and, newly discovered evidence proved that he was not guilty of robbery in the first degree. (C1. 10-26) In support of his claim of newly discovered evidence, Greenwood presented the affidavit of co-defendant Jamar Brown, which stated that Jamar Brown did not know Greenwood and that Greenwood was not involved in the robbery. (C1. 36-39)

On November 24, 2003, the State filed an "Answer and Motion for Summary Dismissal." (C1. 45-72) On December 24, 2003, Greenwood filed an amended Rule 32 petition, where he alleged that his trial counsel was ineffective for

³"C1" refers to the appellate record in Greenwood's first Rule 32 petition. The State requests this Court to take judicial notice of its record in Kourtney Sovern Greenwood v. State of Alabama, CR-03-0633.

failing to subpoena Serillo, for failing to subpoena the three children he claimed to have been babysitting on the night of the robbery, and for failing to object to the jury instruction regarding unanimous verdicts. (C1. 113-122)

On January 13, 2004, the trial court issued an order denying Greenwood's Rule 32 petition for post-conviction relief on the ground that he failed to allege the facts necessary to warrant post-conviction relief as required by Alabama Rules of Criminal Procedure 32.3 and 32.7(d). (C1.

135-138). The trial court did not consider his claim that trial counsel was ineffective for failing to subpoena Serillo. (C1. 1, 135-138)

On August 13, 2004, this Court affirmed the Montgomery County Circuit Court's dismissal of Greenwood's first Rule 32 petition. On August 27, 2004, this Court overruled Greenwood's application for rehearing; on October 15, 2004, the Alabama Supreme Court denied Greenwood's petition for writ of certiorari. Accordingly, this Court issued a certificate of judgment on the matter on October 18, 2004.

On November 8, 2004, Greenwood filed a second Rule 32 petition for postconviction relief in the Montgomery County

Circuit Court. (C. 5-35)⁴ In this petition, Greenwood alleged some of the same issues raised in his first Rule 32 petition: (1) There was newly discovered evidence that the State intimidated Jamar Brown into refusing to testify on Greenwood's behalf and that Brown was now willing to testify; and, (2) his trial counsel was ineffective for failing to subpoena Serillo to testify so that he could refute the testimony of victim/witness Larry Copeland. (C. 13-31) Greenwood also attached a copy of the same affidavit from Jamar Brown that he attached to his first Rule 32 petition. (C. 32-35)

On November 18, 2004, the State filed a motion to dismiss/answer to defendant's petition. (C. 41-45) On that same date, the trial court denied Greenwood's second Rule 32 petition on the following grounds: (1) Greenwood failed to allege actual newly discovered evidence under Alabama Rule of Criminal Procedure 32.1(e) and, thus, a new trial was not required; (2) Greenwood's claim regarding the denial of his right to use compulsory process to compel the presence of witnesses could have been asserted in his

⁴"C" refers to the record in the current appeal, Kourtney Sovern Greenwood v. State of Alabama, CR-04-0334.

previous petition; and, (3) the issue of whether his trial counsel was ineffective for not subpoenaing "Serillo" was asserted in an earlier petition and that this was not ineffective assistance of counsel but, rather, a tactical decision by trial counsel. (C. 46-47) On November 30, 2004, Greenwood filed notice of appeal. (C. 48)

ISSUES PRESENTED FOR REVIEW

1. Did the trial court abuse its discretion by denying Greenwood's claims of newly discovered evidence and ineffective assistance of trial counsel on the basis of being raised in a successive petition?

2. Did the trial court abuse its discretion by denying Greenwood's Rule 32 petition for post-conviction relief without first conducting an evidentiary hearing?

STANDARD OF REVIEW

The standard of reviewing the trial court's denial of a Rule 32 petition is abuse of discretion. See Grady v. State, 831 So. 2d 646, 647 (Ala. Crim. App. 2001); Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999). The

appellate court will not reverse the denial of a Rule 32 petition if the trial court was correct for any reason, even though it may not be the stated reason. See Reed, 748 So. 2d at 233.

SUMMARY OF THE ARGUMENT

Greenwood argues on appeal that the trial court erred by denying his claim of newly discovered evidence based on his assertion that co-defendant Jamar Brown was now prepared to testify in a manner that would exonerate him.

The trial court did not abuse its discretion by denying this claim because the evidence was neither "newly available" nor "newly discovered."

The trial court did not abuse its discretion by denying the petition without first conducting an evidentiary hearing because the claims in the petition were due for summary dismissal. Alabama Rule of Criminal Procedure 32.9(a) states that a petitioner is not due an evidentiary hearing when the petition is summarily dismissed.

ARGUMENT

I. The Trial Court Did Not Abuse Its Discretion By Denying Greenwood's Claims Of Newly Discovered Evidence And Ineffective Assistance Of Trial Counsel Because These Issues Were Raised In A Successive Petition.

Greenwood argues on appeal that the trial court abused its discretion by denying his claims of newly discovered evidence and ineffective assistance of trial counsel. In

addition to finding that there was no actual newly

discovered evidence in regard to his claim that the State

violated his right to compulsory process by allegedly

threatening Jamar Brown into not testifying on his behalf,

the trial court found that this issue could have been

asserted in his previous petition. (C. 46) This issue was

originally raised in his previous petition; however, the

trial court found that Greenwood had not alleged the facts

necessary to establish a claim of newly discovered evidence

as required by Alabama Rules of Criminal Procedure 32.3 and

32.7(d). (C1. 135-138)

In regard to Greenwood's claim that his trial counsel was ineffective for failing to subpoena Serillo, the trial court found that this issue was also raised in the first Rule 32 petition and that this did not constitute

ineffective assistance because it was a tactical decision.

(C. 46) As noted above, Greenwood alleged in an amended version of his first Rule 32 petition that his trial counsel was ineffective for failing to subpoena Serillo.

(C1. 113-122) Because these issues were raised in a previous Rule 32 petition, the trial court acted properly in summarily dismissing the petition as a successive petition.

Alabama Rule of Criminal Procedure 32.2(b) states the following in regard to successive petitions:

If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising out of that same trial or guilty-plea proceeding shall be treated as successive petitions under this rule. *The court shall not grant relief on a successive petition on the same or similar grounds on behalf of the same petitioner.* A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice. (emphasis added)

Thus, because Greenwood is raising the same claims in his second petition that were raised in his first petition, the

trial court was absolutely precluded from granting relief on those claims under Rule 32.2(b). Even if the claims had not been raised in his first Rule 32 petition, they are precluded from review because they do not allege jurisdictional issues and because they fail to state good cause for why they were not raised in the first petition. See Baker v. State, CR-03-0846, 2004 WL 1909359, at *1 (Ala. Crim. App. Aug. 27, 2004); Fortner v. State, 825 So. 2d 876, 877 (Ala. Crim. App. 2001).

A. The trial court properly found that Greenwood's claim of newly discovered evidence was not truly a jurisdictional claim because it is without merit.

Greenwood alleged in his first and second Rule 32 petitions that his co-defendant, Jamar Brown, was unavailable to testify at his trial because he had invoked his Fifth Amendment right not to incriminate himself. (C1. 24-26; C. 13-24) Greenwood alleged that Brown refused to testify because he was afraid the State would retaliate against him by recommending the judge sentence him more harshly pursuant to his previously-given guilty plea. (C1. 25; C. 13-14) Greenwood alleged that Brown was now willing to testify on his behalf due to no longer being afraid that

the State can change his sentence; that Brown would testify that the two of them did not know each other; and, that Greenwood was not with him at the time of the robbery.

(C1. 24-26; C.13-14) In support of this allegation, Greenwood attached the same affidavit to both petitions, which he claimed to be from Jamar Brown. (C1. 36-39; C. 32-35)

Greenwood's claim that newly discovered evidence proved his innocence was properly dismissed in both petitions, under Alabama Rule of Criminal Procedure 32.3, for failing to allege the facts necessary to entitle him to relief.

Alabama Rule of Criminal Procedure 32.1(e) states that the following five elements must be proved to succeed on a claim of newly discovered evidence:

(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

(2) The facts are not merely cumulative to other facts that were known;

(3) The facts do not merely amount to impeachment evidence;

(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and,

(5) The facts establish that the petitioner is innocent of the crime for which he was convicted or should not have received the sentence that the petitioner received.

See Payne v. State, 791 So. 2d 383, 398 (Ala. Crim. App. 1999) (Court held that, "because of the conjunctive 'and' between (4) and (5)," the petitioner must meet all five prerequisites of Rule 32.1(e).).

In his petition, Greenwood argued that this "newly available evidence" was "newly discovered evidence" even though he was aware of it at the time of his trial. (Cl. 24-26; C. 13-14) This Court and the Fifth Circuit Court of Appeals have distinguished between evidence that is "newly available" and that which is "newly discovered" when a co-defendant comes forward after the trial with the willingness to testify that the defendant had nothing to do with the crime. See Marks v. State, 575 So. 2d 611, 617 (Ala. Crim. App. 1990); U.S. v. Metz, 652 F.2d 478, 480 (5th Cir. 1981). The Fifth Circuit stated that "newly available" evidence is not synonymous with "newly discovered" evidence and that "newly available" evidence

does not automatically warrant the relief of a new trial. See Metz, 652 F.2d at 480. The Court distinguished cases in which "newly available" evidence warranted a new trial as those cases where the evidence leading to conviction was weak or ambiguous. See Id. The Court further noted that "newly available" evidence where an obviously guilty co-defendant tries to assume all of the guilt after the trial, must be viewed "in proper legal perspective" because it is not unusual for a co-defendant to do so when that co-defendant no longer has anything to lose. See Id. at 480-481.

Further, in Marks, this Court found that the co-defendant's new willingness to exonerate the defendant was not "newly discovered" because the potential testimony was known before the trial. See Marks, 575 So. 2d at 617. In addition, this Court found that the co-defendant's testimony was not unavailable at the time of the trial because the co-defendant had pleaded guilty before the trial. See Id. at 618. Because the co-defendant was able to testify, the defendant could have compelled his testimony. See Id.

Applying this Court's holding in Marks to the case at bar, Greenwood's proffer of "newly available" evidence does not automatically necessitate a new trial because the evidence used to convict him was not weak or ambiguous. The State presented the eye-witness testimony of Larry Copeland, the robbery victim, to identify Greenwood as one of the two assailants who robbed him on the night of April 8, 2002. (TR. 35-52) Greenwood testified that the two assailants fled the scene in a red S-10 pick-up truck.

(TR. 47, 51-52) The State presented the testimony of Detective N.T. Buce that he developed Jamar Brown and Kourtney Greenwood as suspects based on his interview with Copeland. (TR. 79) Outside the presence of the jury, Detective Buce testified that he developed Brown and Greenwood as suspects because of Greenwood's statement regarding the description of the robbers and the get-away vehicle; Detective Buce explained that he was investigating another robbery where the suspects used a red S-10 pick-up truck and the victim of that robbery identified Brown and Greenwood as the robbers. (TR. 93-95) Detective Buce also testified that Copeland identified Greenwood and Brown out of two photo lineups with people of similar physical

characteristics to Greenwood and Brown. (TR. 80-84)

Therefore, according to this Court's holding in Marks, Greenwood is not automatically entitled to a new trial even if the potential testimony is "newly available" because the State's evidence was not ambiguous or weak.

Further, according to Greenwood's admission in both of his post-conviction petitions, Greenwood was aware of Brown's potential testimony before the trial. (C1. 24-26; C. 13-14) Thus, according to this Court's holding in

Marks, this potential testimony was not newly discovered evidence. In the order denying the first Rule 32 petition,

the trial court cited this as being the reason for denying

the claim of newly discovered evidence. (C. 138) In

addition, the affidavit purported to be from Jamar Brown

states that he pleaded guilty to the robbery on November

21, 2002. (C. 36) Because Brown had already pleaded

guilty to the robbery before the trial on December 10-11,

2002, Brown was available to testify. Therefore, according

to this Court's holding in Marks, this potential testimony is not even "newly available."

In conclusion, this potential testimony of Jamar Brown is highly suspect because it is not unusual for a co-

defendant to take all of the blame when he no longer has anything to lose. See Metz, 652 F.2d at 480-481. This potential testimony of Jamar Brown was not "newly discovered evidence" because, according to Greenwood's petition, he knew of it before trial. (Cl. 24-26; C. 13-14) Further, this potential testimony of Jamar Brown was not "newly available" because Brown could have been compelled to testify due to the fact that he had already pleaded guilty to the offense. (C. 36) Therefore, Greenwood is not entitled to any relief on this claim because it is neither "newly discovered evidence" or "newly available evidence." Because Greenwood failed to allege a claim of newly discovered evidence, the claim is not jurisdictional; thus, this claim is not due consideration in a successive petition. Further, because this was raised in Greenwood's first Rule 32 petition, there can be no good cause for why it was not raised in a previous petition. Accordingly, this claim is precluded from postconviction relief under Rule 32.2(b) because it was raised in a successive petition.

B. The trial court properly denied Greenwood's claim of ineffective assistance because it is neither jurisdictional nor was there good cause for why it should be considered in this second Rule 32 petition.

Greenwood alleged ineffective assistance of trial and appellate counsel in an amendment to his first Rule 32 petition for post-conviction relief and in his second Rule 32 petition. (Cl. 113-122; C. 24-31) Greenwood claimed that his trial counsel was ineffective for failing to subpoena Serillo to testify in rebuttal to Larry Copeland's eyewitness testimony. (Cl. 113-122; C. 24-31) Greenwood now argues that he was entitled to relief for his claim of ineffective assistance of trial counsel, even though it was raised a second time in a successive petition, because the claim was not given full consideration in his first Rule 32 petition. The trial court properly dismissed the claim as being raised in a successive petition because it was raised in his first petition and because it was not a jurisdictional claim. Further, Greenwood failed to allege good cause why the claim should be considered because the trial court properly found that trial counsel was not ineffective. (C. 46)

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court established a two-prong test for determining whether trial counsel was ineffective. First, the petitioner must prove that counsel's performance was deficient, which requires a showing that counsel made errors so serious that counsel was not functioning as required by the Sixth Amendment right to counsel. See 466 U.S. at 687. Second, the petitioner must prove that the deficient performance prejudiced the defense. See Id.

Without both findings, a petitioner cannot prevail on a claim of ineffective assistance of counsel. See Dobyne v.

State, 805 So. 2d 733, 742 (Ala. Crim. App. 2000) (citing Strickland v. Washington, 466 U.S. at 687).

In regard to claims that counsel is ineffective for failing to subpoena certain witnesses, this Court has held the following:

"No ineffective representation results where trial counsel fails to call witnesses whose testimony would only be cumulative to evidence already in the record." Robinson v. State, 361 So.2d 1172, 1175 (Ala. Cr. App. 1978); Lee v. State, 349 So.2d 134 (Ala. Cr. App. 1977). The decision not to call a particular witness is usually a tactical decision not constituting ineffective assistance of counsel. Goodman v State, 387 So.2d 862 (Ala. Cr. App.), cert. denied, Ex parte Goodman, 387 So.2d 864 (Ala. 1980). "Defense counsel's failure to call certain

witnesses is not sufficient grounds for a Sixth Amendment claim." United States v. Hughes, 635 F.2d 449, 453 (5th Cir. 1981). "This Court will not second-guess tactical decisions of counsel in deciding whether to call certain witnesses." United States v. Long, 674 F.2d 848, 855 (11th Cir.1982).

See Oliver v. State, 435 So. 2d 207, 208-209 (Ala. Crim. App. 1983).

Greenwood alleges that Serillo should have been subpoenaed by his counsel because the State did not call him, and that Serillo could have rebutted Larry Copeland's testimony identifying him as one of the robbers.. (C1. 114-119; C. 24-31) Greenwood further alleges that this was very important because Copeland described him as wearing twists in his hair and he presented testimony from witnesses stating that he never wore his hair in this style; however, the State did present a rebuttal witness who testified that Greenwood did wear his hair in twists. (C1. 114-119; TR. 100-137, 148-149; C. 24-31) These allegations of what Serillo may testify to are conclusory statements, however, because Greenwood only states what Serillo might have said instead of to what he would actually testify. Further, as stated in this Court's holding in Oliver, counsel's decisions regarding whether to

call certain witnesses are tactical decisions that do not constitute ineffective assistance of counsel. See Oliver, 435 So. 2d at 208-209.

In denying this successive petition and noting that Greenwood had raised this same issue in his first petition, the trial court also denied this claim of ineffective assistance because the decision not to subpoena a witness is a tactical decision. (C. 46) As noted by this Court in Oliver, the decision not to subpoena a witness who would provide only cumulative testimony is a tactical decision and not ineffective assistance of trial counsel. See Id.

at 208-209. Accordingly, the trial court properly dismissed this claim as being raised again in a successive petition because it was not a jurisdictional claim and because Greenwood failed to allege good cause. Thus, this claim is precluded from postconviction relief under Rule 32.2(b) because it was raised in a successive petition.

II. The Trial Court Did Not Abuse Its Discretion By Denying Greenwood's Petition Without First Conducting An Evidentiary Hearing.

Greenwood argues on appeal that the trial court erred by denying his Rule 32 petition for post-conviction relief without first conducting an evidentiary hearing. This claim is completely without merit because Alabama Rule of Criminal Procedure 32.7(d) allows the trial court to summarily dismiss a Rule 32 petition without further proceedings where it finds "that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings."

The Montgomery County Circuit Court summarily dismissed Greenwood's Rule 32 petition as precluded based upon Rule 32.2(b) because it was a successive petition and these same issues had been raised in his first Rule 32 petition. (C. 46) Alabama Rule of Criminal Procedure 32.9(a) states that a petitioner is not entitled to an evidentiary hearing when the trial court summarily dismissed a Rule 32 petition.

See Baker v. State, CR-03-0846, 2004 WL 1909359, at *4

(Ala. Crim. App. Aug. 27, 2004) (The petitioner was not entitled to an evidentiary hearing on claims clearly precluded due to being raised in a successive petition.); Ex parte Boatwright, 471 So. 2d 1257, 1258-1259 (Ala. 1985) (Petitioner is not entitled to an evidentiary hearing where the petition contains no facially meritorious claims.); Boyd v. State, CR-02-0037, 2003 WL 22220330, at *6 (Ala. Crim. App. Sept. 26, 2003) (Rule 32 petitioners are not automatically entitled to an evidentiary hearing.).

Because the trial court acted properly in summarily dismissing Greenwood's petition for the reasons stated above, Greenwood was not entitled to an evidentiary hearing. Therefore, the trial court did not abuse its discretion by summarily denying Greenwood's petition without first conducting an evidentiary hearing.

CONCLUSION

Based upon the foregoing, the State of Alabama respectfully requests this honorable Court affirm the Montgomery County Circuit Court's denial of Greenwood's Rule 32 petition for post-conviction relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2005, I served a copy of the foregoing on the pro se appellant, by placing said copy in the United States Mail, first class, postage prepaid and addressed as follows:

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